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IN THE

Supreme Court of the United States

October Term, 1961

No. 32

CHARLES CLARENCE HAMILTON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama is reported at —— Ala. ——, 122 So. 2d 602 and appears at R. 27. A prior opinion of the Supreme Court of Alabama in this case is reported at 270 Ala. 184, 116 So. 2d 906 and appears in Appendix A to Petitioner's brief, *infra* p. 1a. This Court's denial of certiorari on a prior petition seeking review of the judgment affirming the conviction is reported at 363 U.S. 852.

Jurisdiction

The judgment of the Supreme Court of Alabama denying leave to file a writ of error *coram nobis* was entered on Au-

gust 15, 1960, R. 36. By order of Mr. Justice Black entered on November 15, 1960, execution of the death sentence imposed upon the petitioner has been stayed pending issuance of the mandate by this Court. The jurisdiction of this Court is invoked pursuant to Title 28 Section 1257(3), petitioner having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

I

Whether, petitioner, sentenced to death for "burglary with intent to ravish", and not represented by court appointed counsel at arraignment as required by Alabama law, had to demonstrate disadvantage flowing from the denial to secure reversal of the conviction under the Fourteenth Amendment to the United States Constitution.

II

Whether petitioner, an indigent, ignorant, unstable Negro, completely untutored in the ways of the law, charged with a capital sex crime against a white woman in Alabama, in open conflict with his court appointed attorney during trial which otherwise was marked by petitioner's bungling efforts to defend himself at the Court's invitation, was deprived of due process secured by the Fourteenth Amendment by lack of court appointed counsel at arraignment, the appropriate time under Alabama law to raise certain defenses, and the only time prior to trial that the Court practicably could have made provision to reconcile counsel and client or appoint another attorney.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Code of Alabama 1940, Tit. 15, §318, which provides:

> *When counsel appointed for defendant in capital case.*—When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, and as compensation for said defense the attorney or attorneys so appointed shall be entitled in each case to a fee fixed by the judge presiding at said trial, which fee shall be not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, to be paid on the warrant of the state comptroller from the general funds in the state treasury. Said presiding judge in the case shall certify to the comptroller that "The attorney or attorneys appointed by the Court in the case of Alabama vs. ..... (name of defendant) has (or have) performed the service required of him (or them) in representing the said defendant and that the fee therefor has been fixed in the sum of ..... dollars (designate amount of fee)." Whereupon a warrant shall be drawn in favor of the attorney or attorneys upon the general funds of the treasury of the state of Alabama in payment therefor.

3. Code of Alabama 1940, Tit. 14, §85, which provides:

> *Burglary in the first degree.*—Any person who, in the nighttime, with intent to steal or to commit a felony, breaks into and enters any inhabited dwelling house, or any other house or building, which is occupied by any person lodged therein is guilty of burglary in the first degree, and shall on conviction be punished at the discretion of the jury, by death or by imprisonment in the penitentiary for not less than ten years.

Statement

This cause now is here for the second time and before recounting the facts in detail, petitioner first briefly relates the reason for successive applications. Petitioner was sentenced to death April 23, 1957 upon an indictment charging burglary with intent to ravish.[1] He appealed to the Alabama Supreme Court, alleging, among other things, that he had been denied due process of law secured by the Fourteenth Amendment in that he did not have effective representation of counsel at trial. See *Hamilton* v. *State*, 270 Ala. 184, 116 So. 2d 906 (1959), and see this petitioner's Petition for Writ of Certiorari, Oct. Term 1959, No. 1026 Misc. The Alabama Supreme Court affirmed, *Hamilton* v. *State, supra,* whereupon petitioner brought the cause here on certiorari (No. 1026 Misc. Oct. Term 1959) making the same constitutional allegations. One of petitioner's particular allegations here was that he did not have any counsel at all at arraignment, concerning which the Alabama Supreme Court had held on his appeal that "the right of accused to assistance of counsel includes the right to assistance from the time of arraignment until beginning and end of trial." 270 Ala. 188, 116 So. 2d 909

[1] The same indictment also charged burglary with intent to steal but petitioner was not found guilty of this count (R. 7).

(1959). Moreover, the Alabama Court acknowledged that this right was secured by the Fourteenth Amendment to the United States Constitution as well as the laws of the State of Alabama. But it held that "the principle is without application to the record before us," reading the record as demonstrating that petitioner indeed was represented by counsel at arraignment. Petitioner's effort to demonstrate that this was not so by reference to other portions of the record was rejected because state law precluded impeaching minute entries. 270 Ala. 188, 116 So. 2d 909 (1959).

The October, 1959 Term Petition for Writ of Certiorari had urged this Court to find as a constitutional fact that petitioner did *not* have counsel at arraignment, that this denial deprived him of due process of law, and that the conduct of the trial, in view of the representation by court appointed counsel, among other things, fell below Fourteenth Amendment due process requirements.[2] But Alabama argued in opposition that

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[2] The questions presented in the first petition were:

1. Whether indigent Negro petitioner, unable to employ counsel, having been indicted for a capital offense regarded with especial horror in this community (i.e., nighttime burglary with intent to steal and with intent to ravish a white woman) and having been incarcerated for approximately five months prior to arraignment, was deprived of due process of law as secured by the Fourteenth Amendment to the Constitution of the United States, by being arraigned and required to plead to said capital indictment without benefit of the advice, guidance, assistance, or presence of counsel in his behalf.

2. Whether petitioner was denied the fundamentals of a fair trial including effective assistance of counsel, contrary to the due process clause of the Fourteenth Amendment, by the trial of a capital case involving difficult legal and factual issues, in which conviction entirely depended upon inferences from circumstantial evidence that petitioner acted with a specific criminal intent, and in which punishment was determined in the discretion of the jury, where:

a. The attorney appointed to defend petitioner sought to withdraw from the case immediately before trial, and petitioner indi-

"[t]he burden is not on the State of Alabama to explain the fancied inconsistency as to why the minute entry of record shows that the defendant did have counsel at his arraignment and yet his trial counsel was apparently appointed three days later. Actually, the counsel in this particular case was appointed quite sometime prior to the official judgment entry to defend the petitioner on a previous indictment and remained assigned as counsel to the defendant throughout and including the day of arraignment on the second indictment. The two entries of judgment are not in conflict and the statement by the petitioner that the defendant was deprived of counsel at the time of his arraignment is pure conjecture on the part of the petitioner's counsel."

Respondent pointed out that

"The petitioner, however, still has available to him another remedy to attack the validity of the judgment entry in this case with extrinsic matter. That method is the writ of error coram nobis. See, for example, *Taylor* v. *Alabama*, 249 Ala. 667, 32 So. 2d 659, affirmed 335 U. S. 252. But the petitioner may not attack the validity of a judgment entry on appeal."

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cated to the court his dissatisfaction with the appointed attorney, all in the presence of the venire, and the trial judge denied the attorney's request to withdraw, without inquiring of him or petitioner concerning the reasons for or nature of their apparent incompatibility, but instead proceeded to trial.

b. The trial judge, under these circumstances, encouraged and permitted petitioner to attempt to supplement the appointed attorney's presentation, even though petitioner at the outset and thereafter plainly demonstrated that he was not versed in law or tutored in courtroom decorum, thereby necessitating repeated reprimands of defendant and lectures by the court in the presence of the jury, prior to and throughout the trial as petitioner clumsily endeavored to examine witnesses and argue points of law.

Brief in Opposition, pp. 5, 6. Certiorari was denied by this Court.

Petitioner now has pursued the suggested course via coram nobis and has amplified the record to demonstrate that in fact he did not have counsel at arraignment. But on *this* application, the Supreme Court of Alabama while reaffirming his right to counsel at arraignment again has rejected his plea:

> "Hamilton should have been represented by counsel at the time of his arraignment. We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented."

Nevertheless, because "[t]here [was] no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty," R. 35, the court rejected his petition.

Petitioner now returns to this Court on petition for writ of certiorari, granted on January 9, 1961. The Petition for Writ of Error Coram Nobis (R. 1), denial of which occasions the instant Petition alleged:

Petitioner first had been indicted November 9, 1956 for burglary in the night time with intent to steal. He was arraigned January 4, 1957, at which time counsel, Mr. Clell I. Mayfield, was appointed and entered a plea of not guilty. Trial was set for January 14, 1957, but was passed four times until April 24, 1957 when the case was nolle prossed on recommendation of the solicitor.

February 12, 1957, the grand jury indicted petitioner for burglary "with intent to ravish" and for burglary with intent to steal. March 1, 1957 petitioner was arraigned in this cause—the one now before this Court. He pleaded

not guilty. At this time no counsel had been appointed to defend on this indictment and no counsel was present. The affidavit of Mr. Mayfield, subsequently appointed to defend petitioner, appended to the petition for Writ of Error Coram Nobis, states:

> That said attorney states to the best of his knowledge, information and belief that he was not present at the arraignment of said Charles Clarence Hamilton on March 1, 1957. Said attorney further states that he did not advise or consult with said defendant at the arraignment of March 1, 1957 (R. 4).

March 4, 1957 Mr. Mayfield who was the court appointed attorney on the prior indictment (burglary with intent to steal) was appointed to defend petitioner on the two-count indictment of February 12, 1957.

The Petition for Writ of Error Coram Nobis then stated that on appeal the Court had held that the minute entry, which recited that petitioner had counsel at arraignment, could not be impeached by the Judge's bench notes. Here, however, the minute entry had been categorically disproved by counsel's affidavit. In view of the fact that the Court had agreed that petitioner possessed state law and Fourteenth Amendment rights to counsel at arraignment, the petition prayed for an order permitting filing of the Writ of Error Coram Nobis.

In opposition to the petition for Writ of Error Coram Nobis, the State alleged that the petition "lack[ed] a probability of truth," that petitioner was represented by counsel at the time of his arraignment on March 1, 1957, and that:

3. Non-representation of counsel at the time of arraignment is not per se a denial of due process. The petitioner must make some showing or allegation of in-

jury or prejudice to this cause. [See Exhibit C attached hereto and made a part hereof.][1]

4. The petitioner has alleged no showing of prejudice and such affirmatively appears of record (R. 12).

An affidavit by Mr. Mayfield submitted by the State asserted that he had been appointed to represent Hamilton on the prior indictment (for burglary with intent to steal) later nolle prossed; that his appointment on the indictment charging burglary with intent to ravish and burglary with intent to steal was not made until three days after it was handed down; that he "knew of the second indictment prior to its being returned by the Grand Jury", was "aware of" the second indictment and arraignment; "considered himself" as representing defendant, and that the arraignment "was done with his consent although he was not present." Furthermore, "he would not have entered any different plea." He considered "the arraignment a mere formality since the same plea would be entered that had been entered on the first arraignment to the first indictment which occurred on the 4th day of January, 1957, and that was his reason for not attending the second arraignment" (R. 13).

The Deputy Circuit Solicitor who prosecuted the case deposed (R. 14) that he spoke with Mr. Mayfield informing him that a new indictment was being procured and later told him that the new two count indictment had been returned and that defendant would be rearraigned. None of the affidavits indicates whether Mr. Mayfield saw this indictment. The prosecutor gave as reason for the appoint-

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[1] This exhibit is the opinion of the United States District Court for the District of Alabama, Northern Division, in *Ex Parte William Powell*, Civil Action No. 1563-N March 4, 1960, in which the petitioner in that case raised the issue of right to counsel. That case now has been reversed on the ground of state suppression of evidence. 287 F. 2d 275 (5th Cir. 1961).

ment of March 4, that it was necessary to assure that the lawyer would receive a fee for the second case:

> . . . realizing further that the record would have to show in order for Mr. Mayfield to receive his fee from the State of Alabama for representing the defendant, Mr. Deason requested Judge King to let the record reflect the fact that Mr. Mayfield had been formally appointed in the second case so there would be no question about his receiving his fee for representing the defendant and this occurred on March 4, 1957 (R. 5).

The Supreme Court of Alabama, held that petitioner had followed the proper procedure (R. 27), but denied the petition for leave to file an application for writ of error coram nobis. It found that Hamilton was not represented by counsel at the time of the second arraignment:

> We hold that it is made to appear in this proceeding that Hamilton was not represented by counsel at the time he was arraigned on the indictment on which he was subsequently tried and convicted. We are not here controlled by the minute and judgment entries, as was the situation on appeal from the judgment of conviction—*Hamilton* v. *State* (Ala.), 116 So. 2d 906 (R. 28-29).

Alabama law "places upon the trial court the responsibility of seeing that an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the indictment" (R. 29). Moreover,

> Hamilton should have been represented by counsel at the time of his arraignment. We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented (R. 29).

But, the petition for leave to file application for Writ of Error Coram Nobis was denied on the ground that Hamilton did not show that he had been prejudiced by this lack of representation (R. 30). The Court concluded:

> We are, of course, not unmindful of the severity of the punishment in this case, but we cannot say that a prima facie case for the filing of a petition for writ of error coram nobis has been made. We must, therefore, deny the petition (R. 35).

The record now brought here on certiorari from denial of leave to file an application for Writ of Error Coram Nobis amplifies the record brought here earlier which this Court may judicially notice, *United States* v. *Pink*, 315 U. S. 203, 216; *United States* v. *California Co-Op Canneries*, 279 U. S. 553, 555; *Bienville Water Supply Co.* v. *City of Mobile*, 186 U. S. 212, 217, as might the Supreme Court of Alabama, *Ex parte Seals*, —— Ala. ——, 126 So. 2d 474 (1961); *Ex parte Powell*, 261 Ala. 246, 73 So. 2d 558 (1954); *Ex parte Burns*, 247 Ala. 98, 22 So. 2d 517 (1945).

At the first trial the evidence indicated that on the night of October 12, 1956 (R.* 55, 77)[4] and on the morning of October 13, 1956 (R.* 21, 39) in Ensley, Alabama, petitioner,[5] a Negro, was found in the bedroom of Mrs. Mary

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[4] R.* refers to the Record filed with the petition for writ of certiorari, No. 1026 Misc., October Term, 1959.

[5] According to a report of the State Board of Pardons and Paroles, petitioner left school after reaching the eleventh grade in 1950. Following a dishonorable discharge in 1956 he did only casual or part time work. The State Board report concluded that he and his family were indigent (R.* 8). Affidavits of his mother and cousin urge that the petitioner was mentally ill (R.* 9, 10) and that court appointed counsel had been told that the family believed petitioner was not sane (R.* 11). Counsel believed, however, that petitioner was sane, although, following trial, the affidavit relates, counsel concluded that petitioner had demonstrated that he was not sane (R.* 11).

Giangrosso (R.* 26, 56, 71) by her granddaughter's husband (R.* 26). The grandmother was elderly, ill, almost blind, and spoke indistinctly with a broken accent (R.* 24). Petitioner testified he could not understand her (R.* 67, 70). His testimony, in fact, was incoherent, but was generally, that he thought she had summoned him to the room (R.* 56), possibly because someone had robbed her (R.* 57). The grandchildren called the police (R.* 27). There was some testimony concerning the condition of the lock, although it was not demonstrated that it had been broken (R.* 42). While the windows and doors had been secured prior to retiring, the door from the porch to the grandmother's bedroom was open (R.* 37).

There was testimony that petitioner was indecently exposed (R.* 35), but Mrs. Giangrosso (the alleged intended victim of rape) did not testify, although counsel for petitioner (the same man who had been appointed on March 4, and had not attended the arraignment) called for her testimony during the trial; since she had not been subpoenaed, she did not testify and he made no effort to secure her attendance (R.* 42, 43).

There was no evidence that any rape, violence, or physical injury of any kind occurred to Mrs. Giangrosso or anyone else, nor evidence that petitioner had any weapons, burglary tools, or the like.

The trial was brief. Taking of testimony commenced at 11:00 and the trial terminated at 4:10 P.M., with an hour and forty minutes recess for lunch (R.* 19, 54, 85).

The trial was marked by constant clashes between petitioner and his court appointed counsel and between petitioner and the court, with petitioner challenging the right of the court to try him on the second indictment and insisting that he did not want the court-appointed counsel

to represent him. As the trial commenced, the Court admonished petitioner: "Let me say this to you: You are represented by counsel. You are not going to disturb this court. I have tried to be courteous to you and explain the law to you, but you are not going to wrangle. You just be quiet." Thereupon, petitioner disavowed his counsel:

> The Defendant: Before you go on, let me say this: This lawyer is not my lawyer. He was appointed by the Court.
>
> The Court: The law provides the Court appoint you counsel. You were appointed the lawyer so that you may get your constitutional rights (R.* 16).

At this point at the beginning of trial the court-appointed attorney requested permission to withdraw; this was denied (R.* 16)—all in the presence of the jury.

Apart from court-appointed counsel petitioner had no other lawyer. The Court provided that petitioner might conduct examinations of witnesses himself after counsel completed examination (R.* 18).

Petitioner's first effort at cross-examination came at the Court's renewed invitation: "Hamilton, due to the fact you stated you did not employ Mr. Mayfield as your attorney, I told you that, after examination by the state and Mr. Mayfield, if you thought of any additional questions you wanted to ask, I would allow it. Can you think of any additional questions to ask this lady?" (R.* 31). Petitioner, apparently addressing himself to the charge of intent to steal, asked, in part "would they say I intended to steal, with my clothes off" (R.* 32). There was an objection to which the Court stated "You may not argue or harass the witness." The Court then inquired "do you have any further questions?" Petitioner replied "No, sir" (R.* 32).

Following testimony of another prosecution witness, the Court addressed petitioner, "Now, Hamilton, do you think of any additional questions, in view of what was stated before, that should be asked this gentleman?" (R.* 37). Petitioner replied "There is nothing I could ask, you would allow." The Court stated "In other words, you just want to ask him why the Grand Jury did so and so?" Petitioner stated "There is nothing I could, that wouldn't show reflection on him." The Court replied "You ask it." Petitioner stated: "There is one of them, right there (indicating)." The Court then stated "I told you you can't ask him about the Grand Jury doing something. If you have other questions, you may ask them" (R.* 37-38). Petitioner stated, "No questions, sir" (R.* 38).

Similar colloquies between the court and petitioner occurred following testimony of Police Officer Cope (R.* 40) and Police Officer Boyd (R.* 42).

Court-appointed counsel after inquiring whether Mrs. Giangrosso was in court, calling her and, upon no response abandoning the thought of having her testify, called the witness, Marisette (R.* 43). He described having spent time with petitioner on the evening of the alleged offense until sometime between 10:00 and midnight. The state cross-examined, and then the Court stated to petitioner, "Hamilton, when these witnesses are put up here on your behalf, if you want to ask them anything, you may do so."

> The Defendant: The defendant will make his own testimony.
>
> The Court: Do you want to ask this last witness anything?
>
> The Defendant: No, sir (R.* 48).

The trial concluded with a lengthy charge to the jury which nowhere defined "intent to ravish", and to which no

objections were taken. Petitioner himself argued to the jury, but said he did not understand the charge. The verdict was guilty and petitioner was sentenced to death.

Summary of Argument

Petitioner was denied due process of law secured by the Fourteenth Amendment because he was not represented by counsel at arraignment on a capital charge; i.e., burglary with intent to ravish. This Court has without qualification held that in a capital case the accused requires the guiding hand of counsel at every step in the proceeding against him. Alabama itself has held that this much is required by its own law and by the Fourteenth Amendment. The refusal to issue the writ of error coram nobis on the alleged ground that petitioner did not demonstrate "disadvantage" would introduce a corrosive influence into the settled rule which has been the view of this Court since *Powell* v. *Alabama*. The appointment and physical presence of a lawyer at arraignment and other judicial proceedings in a capital case is the minimum objective procedural protection due to a defendant which the courts can enforce.

But, even if, *arguendo*, disadvantage need be shown it has been demonstrated fully. It is prejudicial per se not to have counsel at arraignment in a capital case involving difficult and subtle legal questions of, among other things, criminal intent, which turn on inferences from circumstantial evidence. Arraignment was the only point at which petitioner had an absolute right to raise such defenses as jury discrimination and insanity and an appropriate time perhaps to negotiate a plea to a lesser charge if that were to be deemed advisable. Beyond this, the trial was marked by clashes between petitioner and his court appointed counsel, neither of whom wanted this lawyer-client rela-

tionship and so expressed themselves before the jury. Petitioner was chastised by the court before the jury and at the court's invitation repeatedly made bungling efforts to examine witness and argue points of law. Obvious questions concerning the sufficiency and the indictment of the charge were not raised. A crucial witness, the possible subject of the intent to ravish, was not subpoenaed by defense counsel, who merely called for her in the courtroom and when she did not appear abandoned the thought of having her testify.

But even more fundamental, the theory by which respondent and the Court below expiate the failure to provide court-appointed counsel at arraignment is that any failures which might have occurred then because of the absence of counsel were curable by subsequent representation at the trial. This justification simply does not apply where the trial, considered as a whole, including representation afforded at it, was so grossly damaging and unfair to whatever rights petitioner might have protected even at the trial itself. Also, earlier exposure of petitioner to counsel in the presence of the Court at arraignment well might have led to their reconciliation or the appointment of new counsel prior to the trial in chief.

ARGUMENT

I.

The right of counsel during all stages of criminal proceedings where the death penalty may be imposed is so fundamental that it should not be limited at any point by a rule requiring demonstration of the amount of prejudice resulting from denial of representation at a particular stage.

Petitioner, an indigent, not represented by counsel when arraigned on a capital indictment, was tried, convicted, and sentenced to death by electrocution. Lack of representation at arraignment violated Alabama law and the "almost uniform" practice in the Alabama circuit courts. The court below at —— Ala. ——, 122 So. 2d 602, 603-4 held:

> *We hold that it is made to appear in this proceeding that Hamilton was not represented by counsel at the time he was arraigned on the indictment on which he was subsequently tried and convicted.* We are not here controlled by the minute and judgment entries, as was the situation on appeal from the judgment of conviction.—*Hamilton* v. *State, Ala.,* 116 So. 2d 906.

Section 318, Title 15, Code 1940, as amended, provides in pertinent parts as follows: "When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, . . . " *We think this section places upon the trial court the responsibility of seeing that an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the in-*

> *dictment.* We have found no Alabama case expressly so holding, but this has been the almost uniform practice of the circuit courts of this state for many years and the very purpose of the statute seems to dictate such action.
>
> • • • • •
>
> *Hamilton should have been represented by counsel at the time of his arraignment.* We construe the petition and the papers filed in support and in opposition thereof to show, as we have indicated above, that he was not so represented. (Emphasis supplied.)

Notwithstanding this holding and that he had no counsel, his petition for a *coram nobis* hearing was rejected on the ground that Hamilton was not "disadvantaged":

> There is no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty. Counsel was appointed for him three days after arraignment whose competence is not questioned and who asserts in an affidavit filed in this proceeding that "he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957." There is no suggestion that the not guilty plea interposed at the arraignment in absence of counsel prevented the filing of any other plea or motion. (122 So. 2d 602, 607).

The Court explained away its earlier opinion on appeal which had seemed to agree without qualification that denial of counsel at arraignment denies rights protected by federal and state law.[6] Instead it required petitioner to show how

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[6] In the earlier opinion the Supreme Court of Alabama had said at 270 Ala. 184, 188, 116 So. 2d 906, 909:

> Appellant insists that in capital cases where defendant is unable to employ counsel the court must appoint effective coun-

he was harmed by denial of counsel, thus qualifying the right to counsel in a capital case.

While some procedural protections (including the right to counsel in non-capital cases) have indeed been qualified by considerations of this kind, cf. *Betts* v. *Brady*, 316 U. S. 455, heretofore the right to counsel at all stages of capital cases has been regarded as absolute. In a capital case the accused "requires the guiding hand of counsel at every step in the proceeding against him" and the need for counsel is so "vital and imperative" that failure to afford counsel offends due process. *Powell* v. *Alabama*, 287 U. S. 45. Only "when a crime subject to capital punishment is not involved," some Justices have held, does "each case depend on its own facts." *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441. This view was only recently once more expounded by Mr. Justice Stewart in *Spano* v. *New York*, 360 U. S. 315, 327:

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sel for him, and failure to do so denied defendant a fair trial and violates the equal protection and due process clause of the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the State of Alabama; and the right of accused to assistance of counsel includes the right to assistance from time of arraignment until beginning and end of the trial.

We have no quarrel with the above insistence of counsel for appellant, but the principle is without application to the record before us.

In the opinion denying the *coram nobis* petition the Court said at 122 So. 2d 602, 607:

In the opinion written on the appeal from the judgment of conviction (Hamilton v. State (Ala.), 116 So. 2d 906) we did not intend to convey the impression that we entertained the view that absence of counsel at the time of arraignment in and of itself would vitiate the judgment of conviction. We simply did not take issue with the assertions made by counsel for Hamilton in that regard because the minute and judgments entries showed that Hamilton was represented by counsel at arraignment.

> Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. *At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death penalty may be imposed. Powell* v. *Alabama* [*supra*]. (Emphasis supplied.)

This Court frequently has considered the principles governing the Fourteenth Amendment protection of the right to counsel[7] and has made basic distinctions between capital and non-capital cases. While non-capital cases have turned on the particular facts of each case and special circumstances regarding disadvantage to the uncounselled defendant, this rule has not been applied in capital cases. See, *Betts* v. *Brady, supra*: *Bute* v. *Illinois*, 333 U. S. 640, 676; *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; *Palmer* v. *Ashe*, 342 U. S. 134, 135; *Tomkins* v. *Missouri*, 323 U. S. 485, 487.

The importance of representation during all stages of a capital prosecution is manifest, *Powell* v. *Alabama, supra; Moore* v. *Michigan, supra;* the "guiding hand of counsel" should be offered before an accused is required to plead to an indictment. *Williams* v. *Kaiser*, 323 U. S. 471, 475; *House* v. *Mayo*, 324 U. S. 42, 45-46; and "arraignment is too important a step in a criminal proceeding to give . . . wholly inadequate representation," *Von Moltke* v. *Gillies*, 332 U. S. 708, 723.

The court below cited several decisions in support of its conclusion. Some must be distinguished because they involved only non-capital offenses, see, e.g., *Canizio* v. *New York*, 327 U. S. 82.[8] Moreover, unlike *Canizio, supra*, de-

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[7] Many of the cases are collected in *Moore* v. *Michigan*, 355 U. S. 155, 159, n. 7, and *Cash* v. *Culver*, 358 U. S. 633, 636, n. 6.

nial of counsel here violated Alabama's own state law.[8] The other state and lower federal precedents cited below, see, e.g., *People* v. *Moore*, 405 Ill. 220, 89 N. E. 2d 734 (1950); *People* v. *Matera*, 132 N. Y. S. 2d 117 (1954), *Council* v. *Clemmer*, 177 F. 2d 22 (D. C. Cir. 1949), to the extent they seem to support the court's view, are at variance with the rulings of this Court and, if recognized, would introduce a corrosive influence into the settled, salutary rule which has been the view of this Court since *Powell*.

The holding below extends the *Betts* v. *Brady, supra* limitations on right to counsel to the capital area. Without mentioning that non-capital case, the court below applied its theory, making the right in this capital case depend on analysis of the unfairness resulting from lack of counsel. Similarly, without mentioning *Crooker* v. *California*, 357 U. S. 433, the court below applied to arraignment (*following* indictment) *Crooker's* view that the right to counsel *prior* to indictment depends upon circumstances. In *Spano* v. *New York*, 360 U. S. 315, one issue was whether *Crooker* should govern following indictment; while the majority found it unnecessary to reach this issue, several Justices concurred in the view that deprivation of counsel *after indictment* denied due process, thereby invalidating a confession and conviction. See 360 U. S. at 324, 326.

Occasionally, but rarely, when an attorney is actually present, a criminal defendant can demonstrate qualitative unfairness of ineffective representation. Cf. *Von Molke* v.

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[8] Also: *People* v. *Dolac*, 160 N. Y. S. 2d 911 (1957) (non-capital). See *State* v. *Swenson*, 242 Minn. 570, 65 N. W. 2d 657 (1954) (lawyer actually present at arraignment); *State* v. *Sullivan*, 227 F. 2d 511 (10th Cir. 1955) (counsel denied prior to indictment), both capital cases.

[9] Apparently only the dissenting Justices regarded the procedure as violating state law in *Canizio*, 327 U. S. 82, 89.

Gillies, 332 U. S. 708; *Glasser* v. *United States*, 315 U. S. 60, 69-70, and *Powell* v. *Alabama*, *supra*. But unless qualitative ineffectiveness is so flagrant that the trial is a sham efforts to demonstrate that an attorney did his job poorly are futile. See, for example, *United States* v. *Ragen*, 166 F. 2d 976, 980 (7th Cir. 1948); *Sweet* v. *Howard*, 155 F. 2d 715, 717 (7th Cir. 1946) (illiteracy of counsel, if proven, still insufficient to establish incompetency). Alabama's rule is equally strict. *Arrington* v. *State*, 253 Ala. 178, 43 So. 2d 644, 646 (1949). Precisely because to show qualitative inadequacy of representation is so difficult as to be virtually impossible, it is all the more important to require as a minimum objectively determinable procedural protection, that at least *some* attorney be appointed and present to counsel defendant at every stage of criminal proceedings which may culminate in the imposition of a death penalty.

The State seems to regard appointment of counsel on the second indictment (which added the charge, with "intent to ravish," upon which petitioner was convicted) as a "mere formality." The affidavit by the lawyer appointed to defend Hamilton against a prior indictment and appointed again after the arraignment in question, stated his opinion that the arraignment was a "mere formality" (R. 13). The deputy solicitor stated that following arraignment he requested the fresh appointment only to assure that the defense attorney would receive his fee from the State (R. 14). But the fresh indictment obviously was not a mere formality; it charged a wholly different and more reprehensible crime.

Neither the retrospective opinion by defense counsel that nothing different would have occurred if counsel had been appointed before and been present at, arraignment, nor the prosecutor's explanation about his concern over his ad-

versary's fee,[10] changes the fact that counsel and Court did not follow Alabama law as interpreted by its courts and the "almost uniform" practice, which required that the Court see that "an accused indicted for a capital offense has a lawyer before he is arraigned and called upon to plead to the indictment" —— Ala. ——, 122 So. 2d 602, 603-4). In any event, what lawyer can say with assurance what he *would have done* if he had been present in court on an occasion as important as arraignment in a capital case. In a capital case, when a lawyer's diligence and devotion may save his client's life at any stage of the proceedings, no stage properly may be regarded as a "mere formality." As the opinion of the Court held in *Reynolds* v. *Cochran*, 365 U. S. 525, 532-533.

> " . . . even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."[11]

But here no lawyer had been appointed at the time of arraignment and made responsible for exercising wholehearted diligence and devotion. Hamilton did not have the benefit of counsel prior to entry of the plea.

The appointment and physical presence of a lawyer at arraignment and other judicial proceedings in a capital case is the minimum procedural protection due to a defendant which the courts can enforce. The ruling below to the contrary again demonstrates the way that "illegitimate and unconstitutional practices get their first footing . . .

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[10] Under Ala. Code, Tit. 15, §318, *supra*, defense counsel is entitled to a fee of $50 to $100, to be fixed by the court.

[11] And see Knapp, "Why Argue an Appeal? If So, How," 14 The Record 415, 426 (November 1959) in which the author writes "And don't miss any opportunity for communication between you and the Court. If there is a long calendar call, don't send a junior to answer it. Be there yourself."

by silent approaches and slight deviations from legal modes of procedure" in hard cases involving "the obnoxious thing in its mildest and least repulsive form," *Boyd* v. *United States*, 116 U. S. 616, 635. If counsel may be dispensed with at arraignment in a capital case with the rationalization that nothing different would have occurred had he been present, can counsel's presence next be dispensed with during part of the trial on the ground that defendant was not flagrantly over-reached in his absence, or during the charge to the jury on the same theory?

The right to counsel in a capital case is but one of the areas covered by Fourteenth Amendment due process in which a rule placing on the defendant the burden of showing prejudice would lead to erosion of basic standards of integrity in the administration of criminal justice. For example, the right not to have Negroes systematically excluded from a jury which tries a Negro defendant is never qualified by demanding that he demonstrate prejudice from having been tried by the all-white jury. Indeed, where a Negro defendant has been indicted by a *grand jury* constituted in a racially discriminatory manner, and later convicted by a petit jury concerning which no such charge is even made, the conviction will be reversed. *Cassell* v. *Texas*, 339 U. S. 282; and see Justice Jackson's dissenting opinion at 298, 303. This Court continues to adhere to this position. *Eubanks* v. *Louisiana*, 356 U. S. 584. In cases of forced confessions defendants need not show that but for the coerced confession which was introduced into evidence, they would have been acquitted. *Blackburn* v. *Alabama*, 361 U. S. 199. As this Court held in that case:

> In cases involving involuntary confessions this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a convic-

> tion, wrings a confession out of an accused against his will. 361 U. S. 206-207.

Similarly, this Court has held that an accused may not be tried by a tribunal financially interested in the outcome, *Tumey* v. *Ohio*, 273 U. S. 510, 535, even though there was no demonstration that the financial interest played a role in the decision and the evidence clearly indicated guilt. Chief Justice Taft wrote "No matter what the evidence was against him, he had the right to have an impartial jury." And cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 116; *Patton* v. *United States*, 281 U. S. 276, 292.

The right to counsel at all stages of a case in which the death penalty can be (and was) inflicted is the same kind of bedrock right. The Court's opinion in *Glasser* v. *United States*, 315 U. S. 60, 76, while dealing with a different aspect of the denial of counsel, is nonetheless apposite:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

II.

Even if, *arguendo*, a showing of "disadvantage" is required, such amply appears of record.

Petitioner's claim that he has been denied effective assistance of counsel in this capital case in violation of the Fourteenth Amendment is sustained even under a view which requires that there be some demonstration of disadvantage. The claim was made in petitioner's October 1959 Term petition that he was denied effective assistance of counsel in that he did not have a lawyer at arraignment; that he was denied such assistance in that his was a capital

case involving difficult legal and factual issues in which conviction entirely depended upon inferences from circumstantial evidence that petitioner acted with specific criminal intent; and in which punishment was determined in the discretion of the jury; that court appointed counsel sought to withdraw from the case immediately before trial; that petitioner indicated to the court his dissatisfaction with the appointed attorney, and the trial judge denied the request to withdraw without inquiring concerning the reasons for the incompatibility; that the trial judge encouraged petitioner to attempt to supplement his appointed lawyer's presentation even though petitioner demonstrated that he was unversed in law and courtroom decorum, necessitating repeated reprimands in the presence of the jury; that petitioner clumsily endeavored to examine witnesses and argue points of law.[12]

The coram nobis petition was filed following denial of the first petition for writ of certiorari in an effort to elucidate a factual aspect of the proceedings concerning which the parties disagreed (although petitioner contended the record was utterly clear), *i.e.* whether court appointed counsel appeared at arraignment on the two-count indictment charging burglary with intent to steal and "ravish." The coram nobis aspect of the case was "a part of the proceeding in the case to which it refer[red] . . ." *Smith* v. *State*, 245 Ala. 161, 16 So. 2d 315, 316 (1944), or, as this Court has held is "a step in the criminal case, not like habeas corpus where relief is sought in a separate case and record . . ." *United States* v. *Morgan*, 346 U. S. 102, 105, note 4. Consonant with this view, Alabama repeatedly has noticed the record on appeal when it has passed on coram nobis applications. *Ex parte Seals*, —— Ala. ——, 126 So. 2d

[12] See Petition for Writ of Certiorari, October Term 1959, No. 1026, p. 1 (Questions Presented).

474 (1961); *Ex parte Fennell*, 261 Ala. 246, 73 So. 2d 558 (1954); *Ex parte Burns*, 247 Ala. 98, 22 So. 2d 517 (1945); *Johnson* v. *Williams*, 244 Ala. 391, 13 So. 2d 683 (1943); *Ex parte Taylor*, 249 Ala. 667, 32 So. 2d 659 (1947); affirmed 335 U. S. 252. In the latter case, this Court held:

> "The Supreme Court of Alabama . . . read this petition and these affidavits, as we must read them, in close connection with the entire record already made in the case" (at 264-265).

But apart from the customary Alabama practice of reading coram nobis petitions in light of the entire record, respondent itself invoked consideration of the record as a whole and the question of prejudice by its answer to the coram nobis petition:

> "3. Non-representation of counsel at the time of arraignment is not per se a denial of due process. The petitioner must make some showing or allegation of injury or prejudice to this case . . .
>
> 4. The petitioner has alleged no showing of prejudice *and such affirmatively appears of record*" (R. 12). (Emphasis supplied.)

This Court too, apart from the question of disadvantage brought here on this second petition, may examine the question in the light of the full record filed in the October 1959 Term which may be noticed. *United States* v. *Pink*, 315 U. S. 203, 216; *United States* v. *California Co-Op Canneries*, 279 U. S. 553, 555; *Bienville Water Supply Co.* v. *City of Mobile*, 186 U. S. 212, 217, as Alabama may have noticed it. See cases cited *supra*.

As stated in *Reece* v. *Georgia*, 350 U. S. 85, 87:

> "We have jurisdiction to consider all of the substantive federal questions determined in the earlier stages of the litigation . . ."

See also *Urie* v. *Thompson*, 337 U. S. 163.

On appeal the right to effective assistance of counsel issue was treated and disposed of by the Supreme Court of Alabama in sweeping terms:

> Appellant insists that in capital cases where defendant is unable to employ counsel the court must appoint effective counsel for him, and failure to do so denied defendant a fair trial and violates the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the State of Alabama; and that right of accused to assistance of counsel includes the right to assistance from time of arraignment until beginning and end of the trial. 270 Ala. 188, 116 So. 2d 909.

While agreeing with petitioner in theory the decision was adverse to him.

The question of prejudice, or disadvantage, now before this Court for the second time, resolves conclusively on three distinct levels, each demonstrating that the judgment below should be reversed.

(1) Absence of counsel at arraignment must have been by any reasonable appraisal of the nature of arraignment, and the issues posed by this case, prejudicial in and of itself. "The entering of a plea is one of the most critical stages in the proceedings." Orefield, Criminal Procedure From Arrest to Appeal 425. Indeed, arraignment is so crucial a stage of criminal litigation that state law concerning appointment of counsel generally provides that the right attaches at or before arraignment. See Appendix B. As stated in *Von Moltke* v. *Gillies*, 332 U. S. 708, 723, "arraignment is too important a step in a criminal proceeding

to give such wholly inadequate representation to one charged with crime." See also, *House* v. *Mayo*, 324 U. S. 42, 45-46. Petitioner alone could hardly have been expected to know that he might have, for example, negotiated, in exchange for a plea of guilty to a lesser offense, a lighter sentence. See *Williams* v. *Kaiser*, 323 U. S. 471, 475-476.

The nature of the charge emphasized petitioner's inability to cope with the situation he faced. The crucial issue to be tried was the nature of petitioner's intent, for intent was the gravamen of the offense, cf. *Wicks* v. *State*, 44 Ala. 398, 400 (1870), and a serious issue of fact in this case. Faced with an indictment charging burglary with intent to "ravish", petitioner could not assess the nature and weight of the proof relevant to prove or rebut the alleged intent. Indeed petitioner could hardly be expected to understand even what was meant by "intent to ravish" or the elements of the offense.[13] Petitioner could not be presumed to know

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[13] The court's charge, astoundingly, did not at all define ravish. Any uncertainty is not merely a matter of speculation about petitioner's vocabulary. Considering the following, what does "to ravish" mean even to a lawyer who examines the Alabama criminal code?

(1) The burglary statute prohibits burglary "with intent to steal: or "with intent to commit a felony" (Ala. Code Tit. 14, §85).

(2) The Code lists no felony called "to ravish" (Tit. 14, passim); though it does forbid "rape" (Tit. 14, §395).

(3) Only in another Title of the Code does any verbal connection between "rape" and "ravish" appear in the Form of Indictment for Rape—Tit. 15, §259, form 89, which provides: "A.B. forcibly ravished C.D., a woman, etc." The rape statute does not use the word "ravish".

Query: (1) Does the indictment even charge an offense when it charges intent "to ravish", while the burglary statute (and also the form for burglary indictments, Tit. 15, §259, form 29) calls for intent to commit a "felony?"

(2) If the indictment really charges intent to commit the felony of rape, is it sufficient, failing to mention the elements of force, or even the name of the intended victim of rape (par-

that he had any alternative to pleading "guilty" or "not guilty." He could not know that his absolute right to plead "not guilty by reason of insanity" under Ala. Code Tit. 15, §423, is lost if not entered at the time of arraignment. *Morrell* v. *State*, 136 Ala. 44, 34 So. 208 (1903). While there is a discretionary power to allow later entry of the plea this discretion is "not revisable" on appeal and may be reversed only for abuse of discretion. *Rohn* v. *State*, 186 Ala. 5, 65 So. 42 (1914); *Garett* v. *State*, 248 Ala. 612, 29 So. 2d 8 (1947). When petitioner's lawyer was appointed after arraignment, petitioner had already lost an absolute right under Alabama law and he retained merely a right to appeal to the discretion of the Court. Moreover, arraignment is the time to present various defenses under Alabama law. Code of Ala. 1940, Tit. 15, §279.

(2) But beyond this, the trial itself was riddled with explosions caused by petitioner's conflict with the court, his awkward efforts to conduct his defense, petitioner's clashes with his counsel, counsel's efforts to withdraw, the court's censure of petitioner. The conflict between defendant and defense counsel was openly displayed to the venire of prospective jurymen before the trial commenced (R.* 15-16), accompanied by the Court's expression of regret (R.* 17) in holding appointed counsel to his assigned task. This con-

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ticularly when the only aggrieved person named in the indictment is a man)?

Moreover, the dictionary definition of "ravish" gives primacy to the sense of abduction; rape is but a subsidiary meaning, among several. Webster's New International Dictionary (2d ed. unabridged, 1953).

These queries are all obviously questions of state law never raised in the trial court and not directly before this Court; but this is not the point. The point is that, unaided, petitioner could not even be presumed to know that indictments don't always properly state an offense. A lawyer would know to read an indictment with this in mind prior to entry of a plea on the merits.

flict was re-emphasized as the trial progressed, by the court's repeated restatement of its reason for allowing defendant to cross-examine witnesses (R.* 31, 37).

Defendant's inept attempts to represent himself led the trial into chaos and confusion from which defendant emerged the loser, a victim of his own ignorance and bewilderment. The perception and insight of the Court at the outset (R.* 19) in warning defendant about his conduct should have served as sufficient notice that defendant was unlikely to be able to conduct a cross-examination, present evidence, or argue the law according to the usages of the law.

The Court never inquired as to the basis for, or nature of, the dissension between defendant and appointed counsel—although from the start it must have been plain that something was amiss. Defendant's ambiguous statement—"This lawyer is not my lawyer." (R.* 116)—might have concealed beneath it either a real impediment and conflict or merely a confused mind. A few questions might have cleared the air. The defense attorney's motion to withdraw from the case was left similarly unexplained. It is reasonable to assume that Court appointed counsel knew the rule, enunciated by the court below, and familiar to the point of being a cliché, that:

> "In the first place, attorneys at law are officers of the Court. An attorney assigned as counsel ought not to ask to be excused for any light cause" (R.* 111).

He may have fully believed that he had more than a "light cause" for seeking to withdraw in this capital case. But the Court denied the motion summarily without discussion or inquiry.

The request to withdraw comprised the first words uttered by Mr. Mayfield in the record. Was this motion a

spur of the moment reaction to petitioner's statement that Mr. Mayfield was not his lawyer, or counsel's planned first move at the beginning of the case, the product of reflection and lingering doubts? How long in advance of trial did counsel decide that he would prefer not to try the case? How did it affect his preparation? Was the reluctance the product of an inhibiting conscientious belief in his client's guilt, cf. *Johns* v. *Smyth*, 176 F. Supp. 949 (E. D. Va. 1959), a conflict of interest, or other serious impediment? We can only speculate futilely. The jury, too, was left to speculate.

Such an arrangement inevitably resulted in a *pro forma* representation of a kind condemned by the Fourteenth Amendment. *Powell* v. *Alabama, supra,* and *Von Moltke* v. *Gillies, supra,* emphasize respectively denial of real representation, where responsibility is divided and where counsel is reluctant.

The fact that the Court may have hoped to grant petitioner greater protection by permitting him to examine witnesses and act as his own co-counsel, pales in the light of the actuality that petitioner was given merely an implement of further self-destruction. At the end of the trial the Court asked if defendant had any objection to the charge, and the answer (defendant's last words, save two, before the jury retired) obviously applies beyond the specific question, to the entire proceeding:

"I didn't understand it, sir" (R.* 92).

A reading of the trial record will confirm that the evidence contains more than a few mysteries as to what actually transpired, and what petitioner actually intended on October 13, 1957. One thing is apparent: this is no stark record of a ghastly crime; this is not the case of a "notorious criminal" where "guilt permeates a record."[14] This is a

[14] *Abel* v. *United States*, 362 U. S. 217, 241 (dissenting opinion).

case where guilt depended upon a determination of what was in the defendant's mind, upon whether or not he had the intent to commit all the elements of a substantive felony, i.e., rape; and where decision must have been made not on the basis of an inference from a finding of breaking and entering (for this would not support a logical conclusion that defendant had any *particular* felony in mind) but rather from bits of facts, circumstances and inferences. This Court does not sit to review the sufficiency of the evidence, or the adequacy of the court's charge to the jury,[15] but it must necessarily observe the overall record in assessing the prejudice to the petitioner which flowed from the series of events claimed to have resulted in a denial of effective assistance of counsel.[16]

The complex issues in the case called for the utmost diligence on the part of counsel. In this respect the case resembles *Reynolds* v. *Cochran*, 365 U. S. 525, 532-533, where it also was argued that absence of counsel was "harmless." To this the Court replied:

> We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere exist-

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[15] The court's charge on "intent to ravish" is certainly uninformative. For example what does "ravish" mean? Is it not necessary to know the elements of the crime of rape to be able to discover an intent to rape? Is not the intention to employ force or coercion an essential element of the proof? These questions should probably all be answered in the affirmative. See: *Aiola* v. *State*, 39 Ala. App. 215, 96 So. 2d 816 (1957); *Hawkins* v. *State*, 25 So. 2d 441 (1946); *Jackson* v. *State*, 102 Ala. 167, 15 So. 344 (1893); Compare: *Simpson* v. *State*, 81 Fla. 292, 87 So. 920 (1921) and note, Ann. Cases 1913C, p. 517. But could the jury be presumed to know these answers, or the petitioner be presumed capable of raising them in his capacity as "co-counsel" for the defense.

[16] Cf. *Parker* v. *Ellis*, 362 U. S. 574, 577, note 3 (dissenting opinion) (May 16, 1960).

ence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value. Plainly, such assistance might have been of great value to petitioner here.

And, in view of the record and issues which counsel might have raised, much of what was said on the counsel issue in *McNeal* v. *Culver*, 365 U. S. 109, 116, might be said of the same question here:

> These complex and intricate legal questions were obviously "beyond the ken of a layman." Cash v. Culver, supra, at 638.
>
> Indeed, it is questionable whether such a crime as the one upon which petitioner was charged, tried and convicted—"Assault to Murder," not "Assault with Intent to Commit Felony"—actually exists under the Florida law, Williams v. State, supra, and it is equally uncertain whether the verdict, convicting petitioner of "Assault to Murder in the Second Degree," is sufficient to support the judgment in the light of 2 Fla. Stat. 1957, p. 2957, §921.03, which contains the provision that "no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue." See also French v. State, 96 Fla. [illegible] 678 So. 815.
>
> Moreover, the record contains facts which would have instantly suggested to counsel that petitioner might have a good insanity defense. "[W]hen there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." Farrell v. State (Fla. 1958), 101 So. 2d 130, 133. It is too

much to expect this mentally ill petitioner effectively to raise and establish the defense of his own insanity, and, so far as this record shows, neither the prosecutor nor the trial court took any notice of the matter.

Moreover, as a practical matter, the problem of incompatability between counsel and client very well could have been resolved earlier if counsel had been at arraignment. Obviously the matter of representation was one on which the petitioner had brooded long. His first words to the Court were: "This lawyer is not my lawyer." R.* 16. While it is perhaps futile to speculate on what might have been, as court appointed counsel's affidavit has (he "would not have entered any different plea . . ." R. 13 if he had been present), we reasonably may assume that the incompatibility which caused the eruption marking the outset of the trial might have been discovered by the Court if counsel and client had been brought together earlier at arraignment. At such time the Court well could have identified the difficulties and either resolved them or secured new counsel. If this be mere speculation, it further demonstrates the problems of applying a rule of "prejudice" to capital proceedings.

(3) In any event, looking at the cause solely from the vantage of arraignment and in the light of subsequent occurences at the trial, even under the rule proposed by the Court below the judgment below should fall.

Without denying the importance of arraignment or the value of counsel at this initial stage of the case, the Court below relies on a number of cases, including *Counsel* v. *Cremmer*, 177 F. 2d 22 (D. C. Cir. 1949); *Canizio* v. *New York*, 327 U. S. 82; and *In the Matter of the Application of Sullivan and Braasch*, 126 F. Supp. 564 (D. Utah 1954), R. 30-34, for the proposition that representation afforded sub-

sequent to arraignment demonstrates that had opportunities for defense at arraignment been overlooked, counsel might have asserted them at later stages. While this overlooks the fact that, as indicated above, the opportunity to assert such defenses as jury discrimination and insanity became discretionary rather than absolute after arraignment, the record here demonstrates a defect in the reasoning even more fatal.

The shambles into which the trial collapsed, the prejudicial conflict between petitioner and his counsel and the court, petitioner's inept efforts to defend himself, spurred on by the Court, the failure of counsel to explore crucial legal issues, and even to subpoena Mrs. Giangrosso whose testimony he clearly desired, compel the conclusion that here was a situation from which no cure could emerge for earlier failure.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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APPENDIX A

Sep 17 1959

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

SPECIAL TERM 1959

6 Div. 164

CHARLES CLARENCE HAMILTON

—v.—

THE STATE OF ALABAMA

APPEAL FROM JEFFERSON CIRCUIT COURT

LIVINGSTON, *Chief Justice*:

The appellant, Charles Clarence Hamilton, was indicted by the Grand Jury of the Tenth Judicial Circuit of Alabama for burglary in the first degree under the provisions of Sec. 85 of Title 14, Code of Alabama 1940, which reads as follows:

> "§85. Burglary in the first degree.—Any person who, in the nighttime, with intent to steal or to commit a felony, breaks into and enters any inhabited dwelling house, or any other house or building, which is occupied by any person lodged therein is guilty of burglary in the first degree, and shall on conviction be punished at the discretion of the jury, by death or by imprisonment in the penitentiary for not less than ten years."

The indictment contained two counts. Count 1 charged the defendant with breaking and entering into the inhabited dwelling house of Jacob C. Milko in the nighttime with intent to steal, etc. Count 2 of the indictment charged the defendant with breaking and entering into the inhabited dwelling house of Jacob C. Milko in the nighttime with intent to ravish, etc.

The jury returned a verdict of guilty as charged in Count 2 of the indictment and fixed the punishment at death. Judgment was rendered accordingly. Appellant's motion for a new trial was overruled. This appeal comes to this court under the Automatic Appeal Statute, Title 15, Sec. 382, Code of Alabama 1940, Cumulative Pocket Part. The Honorable Clell L. Mayfield was appointed by the trial court to, and did, defend the appellant on his trial in the court below. On appeal, it appears that the appellant is represented by four other and different attorneys at law.

The evidence for the state tended to prove the following:

On the night of October 13, 1956, Mr. and Mrs. Jacob C. Milko were occupying a dwelling house designated at 1501 Avenue G. Ensley, Jefferson County, Alabama. Living with Mr. and Mrs. Milko were the grandparents of Mrs. Milko. The grandparents were Jake Giangrosso and Mary Giangrosso, each of whom occupied separate rooms. The grandmother, Mrs. Mary Giangrosso, occupied a room adjoining that of Mr. and Mrs. Milko, connected by a door between the two rooms. Mr. Giangrosso's room also had a door leading out to the front porch of the dwelling house. Jake Giangrosso occupied a room in another part of the dwelling.

During the early morning hours, sometime between 2:00 and 3:00 o'clock of October 13, 1956, Mr. and Mrs. Milko heard the grandmother in the adjoining room making a loud noise or groaning. Mr. Milko got out of bed and opened the door leading into Mrs. Giangrosso's room,

where he found the defendant, Charles Clarence Hamilton, standing near the door between the two rooms. His shoes were off, one being under the bed of Mrs. Giangrosso, and the other near the front door. His pants were off and were on the bed of Mrs. Giangrosso, and he was in his undrewear, and as expressed by Mr. Milko, "His downstairs was hanging out, and he didn't have no shoes on and he had an old corduroy shirt on, and he was staring me straight in the face. That was all he had on." The front door of Mrs. Giangrosso's bedroom leading to the porch was open. Mr. Milko went back in his bedroom and procured a revolver, returned to Mrs. Giangrosso's bedroom where the appellant was still standing, turned on the light, held his gun on appellant, and told his wife, Mrs. Milko, to call the law. Mrs. Giangrosso was standing between the bed and the door leading into Mr. Milko's room. Upon turning the lights on, the front door was seen to be wide open. Mr. Milko held the appellant until two police officers arrived, which was only a few minutes. Mr. Milko further testified that he was employed by the Tennessee Coal, Iron and Land Company in the Transportation Division, and that on the day in question, his working hours were from 3:00 P.M. until 11:00 o'clock; that when he got home his wife had retired and his wife's grandmother and grandfather had also retired; that he unlocked the front door leading into Mrs. Giangrosso's beroom and went through her bedroom into his own bedroom, and Mrs. Giangrosso was in bed at that time, as was also his wife.

Testimony further shows that Mrs. Giangrosso is of Italian birth, speaks English with difficulty, is partially blind, more or less feeble, and suffers with a heart condition. Testimony further shows that the front door leading from Mrs. Giangrosso's bedroom to the outside was locked prior to the defendant's entry, and after apprehension of the defendant marks of a forcible entry were found on the

door leading from the porch into Mrs. Giangrosso's bedroom.

Mrs. Milko testified that she had seen the defendant at previous times walking in front of the Milko dwelling and at those times he made certain obscene motions with his hands.

The appellant testified, in substance, that Mrs. Giangrosso came out of her house on the night in question and began to yell at him, and grabbed him by the arm and forced him to accompany her into her room; that she made him sit down by her bed for about an hour and take off his shoes; that her son-in-law came in and pulled his pistol on him and held him for the police. The appellant further testified that he was indicted November 9, 1956, by the Grand Jury for nighttime "burglary with intent to steal." (This testimony will be referred to later.) Appellant further testified that there was no telephone in the (Milko) house, and that Milko went outside the house to get the police.

In rebuttal, both Mr. and Mrs. Milko reiterated their testimony to the effect that there was a telephone in the Milko home and that Mrs. Milko called the officers while Mr. Milko held the appellant. The evidence further tends to show that the Milko home is located within two or three blocks of the police station.

Appellant insists that in capital cases where defendant is unable to employ counsel the court must appoint effective counsel for him, and failure to do so denied defendant a fair trial and violates the equal protection and due process clause of the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the State of Alabama; and that right of accused to assistance of counsel includes the right to assistance from time of arraignment until beginning and end of the trial.

We have no quarrel with the above insistence of counsel for appellant, but the principle is without application to the

record before us. The record discloses that Hon. Clell I. Mayfield was appointed by the court to defend, and did defend, the appellant on his trial in the court below. But counsel who now represent appellant on this appeal insist that Mr. Mayfield was not appointed until after appellant was arraigned and had entered a plea of not guilty. Present counsel attached to their brief a certified copy of the bench notes of the trial judge in this case. The argument is that the bench notes show that appellant was arraigned on March 1, 1957, and also show that Mr. Mayfield was appointed counsel for appellant on March 4, 1957. The record contains the following minute entry:

"ARRAIGNMENT

"THE STATE

vs.

CHARLES CLARENCE HAMILTON

Indictment for Burglary with intent to Steal, Burglary with Intent to Ravish

Honorable Wallace Gibson, Judge Presiding

"This the 1st day of March, 1957, came Emmett Perry, Solicitor, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by attorney, and the said defendant being now in open Court, and being duly arraigned upon the indictment in this cause, for his plea thereto says that he is not guilty."

Also, the judgment entry of the 23rd day of April, 1957, the date on which appellant was tried, is to the same effect as the minute entry upon arraignment.

A minute entry constitutes the final record of a judgment. It cannot, in a court of record, be impeached by the judge's bench notes or memoranda, which operate only as a direction to the clerk as to what judgment and orders shall be entered on the court's records. *Ex parte Haynes* v. *State*

of Alabama, 39 Ala. App. 349, 98 So. 2d 670; *Lockhart* v. *State*, 30 Ala. App. 297, 39 So. 2d 40.

In *Du Pree* v. *Hart*, 242 Ala. 690, 8 So. 2d 183, 186, it is stated:

> "It is said in Briggs v. Tennessee C., I. & Ry. Co., 175 Ala. 130, at page 142, 57 So. 882, that there is no law requiring a judge to make bench notes, and because such notes do not include rulings which appear in the judgment entry is not good ground to hold that such rulings were not made. Bench notes were not necessary to sustain a judgment entered on the minutes during the term of court, against attack made on the judgment; and the judgment entry prevails over the bench notes when they conflict. Lockwood v. Thompson & Buchmann, 198 Ala. 295(3), 301, 73 So. 504. But they were always necessary to justify an order nunc pro tunc. During the term prior to the Code of 1923 the judge had control of the entry and could add to, strike out or alter its records. Wilder v. Bush, 201 Ala. 21, 75 So. 143. Under section 6670, Code of 1923, the judge had such power for thirty days after the judgment was rendered. Code of 1940, Title 13, section 119."

Counsel for appellant next insist that to constitute burglary in the first degree "there must be a breaking and entertering of the dwelling house of another with an intent to commit a felony therein." This argument presents purely a question of fact in that the evidence was amply sufficient to prove a breaking and entering of the dwelling of another in the nighttime with the intent to commit a felony therein, and is without merit.

The appellant testified in his own behalf. After appellant had been cross-examined by the solicitor for the state, he, as distinguished from re-direct examination by his attorney, requested the court to allow him to testify further.

The trial court granted the request. The appellant then proceeded to testify to the effect that he had been indicted twice for the same offense, and made certain other irrelevant and immaterial statements. The trial court interrupted the appellant and explained to him that he was entitled to testify only to matters that were relevant and material to the matters involved in the indictment upon which he was then on trial. We have carefully examined the proffered testimony, which is our duty under the Automatic Appeal Statute, and are clear to the conclusion that no error intervened in reference to the proffered testimony, nor did error intervene as to the manner or method in which the trial court conducted this part of the trial, nor as to the colloquies which ensued between the trial court and appellant with reference thereto.

Mention is made in brief of other colloquies between the court and the defendant during the trial in the court below. Suffice it to say, that no objections were made nor exceptions reserved to any remarks made by the court.

It was stated in *Washington* v. *State*, 259 Ala. 104, 65 So. 2d 704:

> "• • • Only review of rulings on trial with respect to matters of evidence are within the scope of the statute obviating the necessity of interposing seasonable objection and exception. Code 1940, Title 15, § 382(10), 1951 Cum. Pocket Part, Vol. 4, p. 103; Broadway v. State, 257 Ala. 414, 60 So. 2d 701(4); Townsell v. State, 255 Ala. 495(4), 52 So. 2d 186; James v. State, 246 Ala. 617, 21 So. 2d 847."

See, also, *Jackson* v. *State*, 260 Ala. 641, 71 So. 2d 825.

At the beginning of the trial of appellant on April 23, 1957, defendant stated to the court that the lawyer appointed to defend him by the court was not his lawyer, and the court-appointed attorney asked permission to withdraw

from the case. On this occasion, the court asked the appellant if he had other counsel, and he replied that he did not. Thereupon, the court explained the purposes and duty of the court to appoint capable counsel to represent those defendants charged with capital offenses who were unable to employ counsel, and declined to allow the court-appointed counsel to withdraw.

Sec. 318, Title 15, Code of 1940, as amended by Act No. 176, Acts of Alabama 1947, p. 61, provides that:

> "When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, • • • "

In the first place, attorneys at law are officers of the court. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause. Code of Ethics of Alabama State Bar Association. In the second place, the appellant did not indicate to the court that he wished the court-appointed attorney to withdraw from his defense, nor that he was unfaithful or incompetent. He merely stated, without more, that the court-appointed attorney was not his lawyer. The record before us does not indicate to the slightest degree that the appellant was seeking to discharge his attorney in order to exercise his right to conduct his own defense. At most, the statement made by the appellant indicated only that he did not approve of the court-appointed attorney. But present counsel insist that under these circumstances representation could be nothing more than pro forma. But in their brief, with commendable candor, they stated: "We do not mean to reflect upon the capabilities of counsel representing defendant."

Even conceding that appellant requested the dismissal of his court-appointed attorney, to yield to such a request, where the defendant has not made it clear that he really wishes to conduct the defense in propria persona gives far too great a chance to delay trials and otherwise embarrass effective prosecution of crime. *United States* v. *Gutterman*, 147 F. 2d 540, 157 A. L. R. 1221; *United States* v. *Mitchell* (2d Cir.), 137 F. 2d 1006, Id. (2d Cir.), 138 F. 2d 831.

We have carefully examined the record with reference to the conduct of the trial by the court-appointed attorney, and are of the opinion that he did his full duty under the circumstances. And as was stated in *Arrington* v. *State*, 253 Ala. 178, 43 So. 2d 644:

> "While an attorney must see that the rights of his client are protected, he cannot be subjected to censure because he does not manufacture evidence."

There is no merit in this contention of the appellant.

The trial court refused six written charges duly requested by the appellant. Charge 1 relates only to Count 1 of the indictment. The defendant was convicted under Count 2 of the indictment, therefore, reversible error could not intervene because the verdict of the jury was, in effect, and acquittal under Count 1 of the indictment. Charge 2 is in the following language:

> "2. The court further charges that intent to ravish must be accompanied by violence or force towards the person before it can be distinguished as such, and if the jury does not find from the evidence such dements (sic) of force or violence, they must acquit the defendant under the 2nd Count in the indictment."

Charge No. 2 is an incorrect statement of the law. The breaking and entering the house with intent to ravish is the gravamen of the offense charged in Count 2 of the in-

dictment, and it is not required that the intended act be consummated. L. Whart., Crim. Law, 8th Ed., Sec. 818; *Wicks* v. *State*, 44 Ala. 398; *Wolf* v. *State*, 49 Ala. 359; *Barber* v. *State*, 78 Ala. 19; *Holland* v. *State*, 247 Ala. 53, 22 So. 2d 519. The charge is also inaptly drawn and is confusing in its tendencies. For like reasons, Charges 5 and 6 were properly refused.

Charge No. 3 was substantially covered in the oral charge and its refusal was without error.

Refused Charge 4 is misleading and incorrect under the evidence presented in this case. There is no evidence that the dwelling house entered and occupied by Jacob C. Milko and family was effectively divided into portions, rather, the evidence is uncontroverted that the house was occupied by Mr. Milko and his family as a unit.

We have examined the record with care and find no error to reverse.

Affirmed.

Lawson, Simpson, Stakely, Goodwyn and Merrill, *JJ.*, concur.

APPENDIX B

A large number of states have concluded that arraignment is so essential a stage of criminal proceedings that the right to counsel attaches at that point. The Supreme Court of Alabama has, in the present case, recognized that the right to counsel in capital cases attaches at the arraignment stage. See R. 29; Code of Ala., Tit. 15, §318 (appointment of counsel for indigents in capital cases). The legislatures of nineteen states have implemented this policy in statutes which require courts to appoint counsel for indigents in virtually all felony prosecutions: Alaska Code (1948) §66-10-3 (no specific mention of duty to appoint); see Const. Art. XV, §1 (continuance of laws after statehood). Ark. Stat. Ann. §43-1203 (See *Swagger* v. *State*, 227 Ark. 45, 296 S. W. 2d 204 (1956)). Calif. Penal Code §987 (See *People* v. *Harel*, 134 Cal. App. 2d 213, 285 P. 2d 317 (1955)). Idaho Code Ann. §19-1512 (See *State* v. *Poglianich*, 43 Idaho 409, 252 Pac. 177, 181 (1927)—right-to-counsel provisions); (See also §19-1513). Ill. Supreme Court Rules, Rule 26(2). Ill. Rev. Stat. §101.26(a); (See also Ill. Criminal Code §730). Iowa Code Ann. §775.4. Gen. Stat. of Kansas (1959 Supp.) §62-1304 (See *Brandt* v. *Hudspeth*, 162 Kan. 601, 178 P. 2d 224, 227 (1947)—provision mandatory). Mo. Rev. Stat. (1949), §545.820 (See *State* v. *Allen*, 174 Mo. 689, 74 S. W. 839 (1903) and *Edwards* v. *Nash*, 303 S. W. 2d 211, 215 (Kan. City C. A. (1957)—capital case). Rev. Code of Montana, §94-6512. Nev. Rev. Stat. §174.120. N. Y. Code of Criminal Procedure §308. North Dakota Century Code, §29-13-03. See N. D. Century Code, §29-01-27 (assignment of counsel). 22 Okla. Stat. §464 (Cf. *Johnson* v. *State*, 79 Okla. Crim. 363, 155 P. 2d 259, 260 (1945) (Syllabus by the court—capital cases); Ore. Rev. Stat. §135.320. South Dakota

Code §34.3506 (1960) (See *State* v. *Jameson*, 77 S. D. 340, 91 N. W. 2d 743, 745 (1958)) (See also 34.1901). Utah Code Anno. §77-22-12. Code of Va. §19.1-241 (appointment of counsel before accepting plea). Rev. Code of Wash. §10.40.030 (See *State* v. *Dechman*, 51 Wash. 2d 256, 317 P. 2d 527 (1957), *Friedbauer* v. *State*, 51 Wash. 2d 92, 316 P. 2d 117 (1957)) (See also §10.01.110); Wis. Stat. Ann. §957.26(2).

The judicial rules of two states require that counsel be appointed for indigents at the arraignment stage: Arizona Rules of Criminal Procedure, Rule 39(b); cf. New Jersey Rev. Rules, §1:12-9, with Author's Comment (at arraignment whenever practicable).

Texas requires that indigents charged with capital offenses have counsel appointed at arraignment. See Vernon's Texas Code of Criminal Procedure §494, as amended by Acts 1959, 56th Leg., p. 1061, c. 484, §1, with §491 and *Hill* v. *State*, 310 S. W. 2d 588 (Tex. Cr. 1958).

Courts of two states have interpreted their state constitutions to require that one charged with crime is entitled to representation of counsel at every stage of litigation. If the accused is indigent the courts are required to appoint effective counsel. Ind. Const. Art. I, §13. See *State ex rel. Grecco* v. *Allen Circuit Court*, 238 Ind. 571, 574, 153 N. E. 2d 914, 916 (1958) (at every stage); *Batchelor* v. *State*, 189 Ind. 69, 125 N. E. 773 (1920) (Ind. Const. Art. I, §13 applies to early stages of litigation); Ky. Const. Art. I, §11, See *Calhoun* v. *Commonwealth*, 301 Ky. 789, 193 S. W. 2d 420 (1946) (counsel must be appointed for indigents); *Wilcher* v. *Commonwealth*, 297 Ky. 36, 178 S. W. 2d 949 (1944) (right to counsel at each stage of the trial).

Statutes or court rules of four states provide for the appointment of counsel to represent indigents after indictment, the implication being that appointment is to be

before arraignment: Minn. Stat. (1957), §611.07, as amended by Minn. Laws 1959, c. 383 (See the unamended statute which speaks specifically of the right to counsel at arraignment, and see *State ex rel. Welper* v. *Rigg*: 254 Minn. 10, 14, 93 N. W. 2d 198 (1958)); Ohio Rev. Code §2941.50 (see *State* v. *Cartwright*, 81 Ohio L. Abs. 226, 161 N. E. 2d 456, 457 (1957)—"both before arraignment and at all subsequent stages of the case."); W. Va. Rules of Practice for Trial Courts Rule IV(a); Wyo. Stat. §7-7.

Three other states, which have provided for the appointment of counsel to represent indigents, appear to have endorsed the practice of appointing counsel at very early stages of litigation: Ga. Const. Art. 1, §5 (Ga. Code Anno. §2-105). See *Bibb County* v. *Hancock*, 211 Ga. 429, 436, 86 S. E. 2d 511, 517 (1955) (the constitutional provision requires appointment of counsel to represent all indigents accused of an offense), and Ga. Code Ann. §27-3001 (A) (capital cases—"[w]hen ever it shall appear," that indigent accused is without counsel). Mich. Stats. Ann. §28.1253 as amended by Public Acts 1957, No. 256 ("Whenever any person charged . . . shall be unable to procure counsel.") See Op. Mich. Att. Gen., Oct. 7, 1957 (provision interpreted to mean that counsel should be appointed for indigents after they are bound over for trial). But see, *People* v. *Williams*, 225 Mich. 133, 195 N. W. 818 (1923) (no general right to counsel at public expense). See Tenn. Code §40-2002 ["counsel in all matters necessary for his defense"] with §40-2003 [appointed counsel for indigents]. See also: *Poindexter* v. *State*, 183 Tenn. 193, 191 S. W. 2d 445 (1946) [murder charge—counsel appointed after arraignment and given little opportunity to confer—violation of United States Constitution, Amend. VI and Tenn. Const. Art. I, §9].

Two states provide that in capital (and other serious) cases if an indigent defendant appears in court without

counsel, counsel shall be appointed apparently at early stages. See Del. Code Ann. §5103 with Superior Court Rules, Rule 44 ("to represent him at every stage"). Purdon's Pa. Stat. Tit. 19, §§783, 784. See *Commonwealth ex rel. Sheller* v. *Burke*, 367 Pa. 152, 79 A. 2d 654 (1951) (the extent of the right at arraignment).

Maryland provides that an accused must at least be informed of his right to counsel at arraignment. See Md. Rules of Procedure, Criminal Causes, Rule 723(b); *Roberts* v. *State*, 219 Md. 485, 150 A. 2d 448 (1959), and *Bryant* v. *State*, 218 Md. 151, 145 A. 2d 777 (1958).